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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ~~1786~~

SANDRA ADICKES and JAMES HORELICK,

Petitioners,

against

HOWARD R. LEARY, Police Commissioner of New York City, FRANK S. HOGAN, District Attorney of New York County, ANDRE CLARMONT, Custodian, Washington Irving High School, GERALD OAK, Principal, Washington Irving High School and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Respondents.

BRIEF OF ATTORNEY GENERAL IN OPPOSITION TO CERTIORARI

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, dated January 7, 1971, affirming the District Court's denial of petitioners' motion for a three-judge court, and affirming the District Court's dismissal of petitioners' action brought under Civil Rights statute, is reported at 436 F. 2d 540. The opinion of the District Court for the Southern District of New York, dated December 1, 1969 is not yet reported.

Jurisdiction

Petitioners allege that the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Reasons Why Certiorari Should Be Denied

The salient facts are set out in the brief of District Attorney Hogan in opposition to certiorari (Br. pp. 1-10). When petitioners commenced the action in the District Court, they challenged the constitutionality of New York Penal Law §§ 140.10 and 35.27. Consequently the Attorney General intervened to defend the constitutionality of such statutes if passed upon by that court. In the posture of the petition as presented to this court, petitioners have abandoned any challenge to the constitutionality of such statutes. The District Court had held that: "The Constitutional objections of plaintiffs are available to them in the State Court, and, of course, on appeal from any adverse effect in the criminal case." This expression was in conformity with *Younger* v. *Harris,* 401 U. S. 37 (1971).

We, therefore, do not believe it requisite to discuss the constitutionality of the statutes referred to not disposed of below, which in § 140.10 deals with criminal trespass and in § 35.27 stipulates that physical force may not be utilized to resist an arrest being effected by a police officer. Section 140.10 has already been held constitutional both by the State court (*In re D.,* 58 Misc. 2d 1093, 296 N.Y.S. 2d 825 (1968) and the Federal court (*Ahmed* v. *Rockefeller,* 308 F. Supp. 935 [So. Dist. N. Y. 1970]) and, as respondent District Attorney points out (Br. p. 8), petitioner has been tried and convicted in the State court and an appeal in the State court system is pending. In this appeal any constitutional questions including statutory challenges may be pursued. In any event the position of petitioner would appear to be contrary to the view in *City of Greenwood* v. *Peacock,* 384 U. S. 808, 827 (1966).

While not bearing on the constitutionality of the statutes, we support the position of the District Attorney, that the allegations of the complaint exclude any claim of conspiracy (*Snowden* v. *Hughes*, 321 U. S. 1 (1944)); that there is an absence of exceptional circumstances which would justify the continued maintenance of the damage action, instituted while the criminal proceeding was pending, evidently as a whipsaw to discourage any enforcement of the criminal proceedings, and that the District Attorney under settled law is immune from such damage claim. *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967).

CONCLUSION

No Particular Reasons Exist for the Grant of Certiorari. The Application Should be Denied.

Respectfully submitted,

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